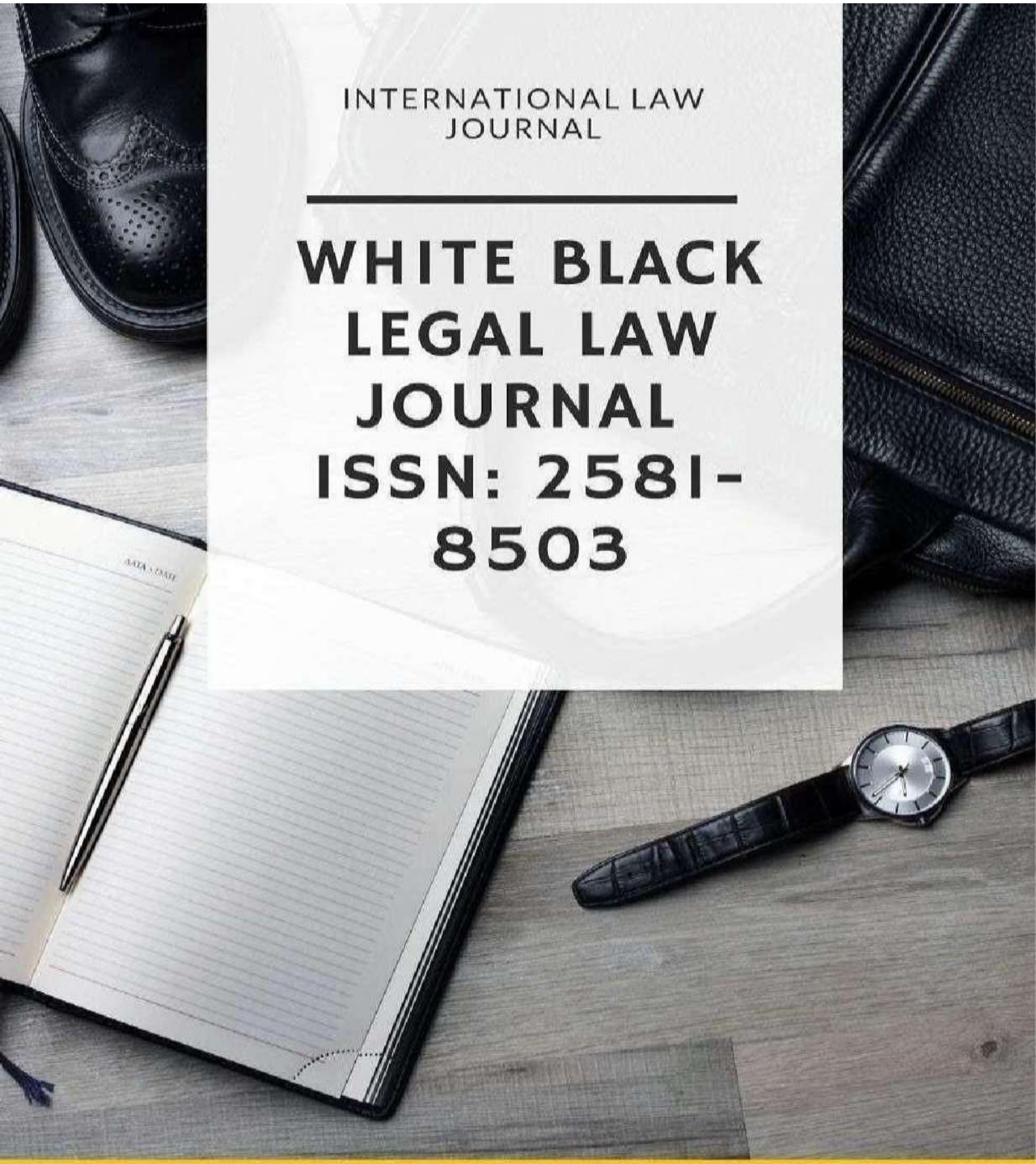

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

MONKEY SELFIE: EXPLORING COPYRIGHT AND ORIGINALITY IN PHOTOS ON THE INTERNET

AUTHORED BY - SREE POOJAA

ABSTRACT

This research delves into the widely recognized case of a macaque monkey utilizing British photographer David Slater's camera in Indonesia to capture a self-portrait in 2011. The resulting selfie gained global prominence upon its dissemination through British media channels. In 2014, Slater submitted a removal request to Wikimedia Commons, contending that the image fell within the public domain due to its origin from the monkey, a non-copyrightable entity according to Slater. While existing legal analyses predominantly focus on U.S. jurisdiction, this paper adopts a distinct approach by reevaluating the case within the framework of UK and European legal perspectives. The significance of the monkey selfie extends beyond copyright issues, particularly influencing internet policy and offering insights into online jurisdiction complexities. In light of prevailing originality criteria, this study argues that David Slater possesses a credible copyright claim to the self-portrait.

I. Introduction

In July 2011, a famous photo of a smiling monkey in Indonesia's national park made headlines worldwide. British photographer David Slater took this picture during a three-day trip to observe a group of monkeys. Trying to connect with them through photography, Slater set up cameras, including one on a tripod, aiming for close-up shots. Describing the encounter, Slater shared that the monkeys playfully interacted with the camera, creating funny and captivating images.

During the thirty-minute photo session, hundreds of images were taken, but only a few met the criteria for clarity and usability. Slater picked three standout pictures, and shared them with the Daily Mail, leading to widespread coverage in various news outlets and rapid popularity online.

However, the photo's popularity led to legal challenges. In 2014, a dispute with Wikipedia arose,

claiming the picture was in the public domain as it came from a non-human animal. In 2015, People for the Ethical Treatment of Animals (PETA) sued Slater in a California court on behalf of the monkey, asserting copyright claims. The judge ruled in 2016 that the monkey wasn't an author under the U.S. Copyright Act.

Online discussions often assume the photo lacks copyright protection, mainly focusing on U.S. law. However, there's a significant oversight considering Slater's British nationality and the photo's Indonesian origin. This article aims to reevaluate the case from the UK and European legal perspectives, starting with jurisdictional considerations, exploring relevant case law on photograph originality, and considering broader implications for internet policy. The monkey selfie case provides valuable insights into the complexities of online jurisdiction.

II. JURISDICTION ISSUES

Before diving into the copyright aspects of the monkey selfie, it's essential to grasp the legal jurisdiction surrounding it. The widespread online sharing of the image often overshadows details like Slater's nationality. The complex nature of internet law, extensively discussed by scholars (Kohl, 2007; Spang-Hanssen, 2004; Trammell & Bambauer, 2014), arises from the inherently international character of the internet. Fortunately, copyright jurisdiction, while fundamentally national (Goldstein, 2001), is relatively straightforward.

According to the Berne Convention (Art 5(1)), a work is protected in its country of origin, usually where it was first published (Berne Convention, Art 5(4)(a)). Despite the photo being taken in Indonesia, its initial publication in the UK through Caters News Agency makes applying UK copyright law, as the jurisdiction of origin, reasonable. UK courts have a historical inclination to support their nationals (Van Eechoud, 2003), evident in cases like Pearce v Ove Arup. The CJEU consistently backs creators in jurisdictional matters, as observed in Pinckney v Mediatech and Hejduk v EnergieAgentur.

However, some analyses favor U.S. copyright law, perhaps assuming Slater's U.S. citizenship. U.S. jurisdiction becomes relevant due to the PETA lawsuit (Naruto v Slater), where the monkey is identified as Naruto, seeking U.S. copyright ownership. In January 2016, the judge dismissed PETA's

claims, stating the monkey lacks standing as an author under the U.S. Copyright Act. The jurisdictional question, though less emphasized, is intriguing. PETA filed in California, citing Slater's book publication through Blurb, a Delaware company. Blurb's U.S. origin was the basis, but its UK website and acceptance of GBP suggest Slater presumed a UK base. If Slater used the Blurb.co.uk site, compelling him to a Californian court might not be straightforward. PETA, with UK offices, could have pursued action in an English court.

While Naruto v Slater supports arguing for U.S. jurisdiction, the judge's focus on animals' incapacity to sue leaves jurisdiction open. The case doesn't address public domain status, Slater's authorship, or applicable jurisdiction. The deliberate omission leaves jurisdiction open to interpretation. Importantly, the U.S. case doesn't prevent Slater from pursuing UK litigation.

III. ORIGINALITY

Apart from the PETA issue, let's talk about what happened when the monkey pictures were put on Wikipedia in 2011. Caters News Agency and David Slater asked Wikimedia, who runs Wikipedia, to remove the high-quality photo. But Wikimedia said no and explained what happened in a report. The report talked about a time in Indonesia when a female crested black macaque monkey found a camera, and took lots of pictures, including some of herself, which later got used in an online newspaper and on Commons. Wikimedia said no to the photographer's request, saying they own the copyright.

The problem comes up when looking at this. Many people say the photo can't have copyright because a monkey took it, so it's automatically public property. Legal talks, usually U.S.-focused, talk about originality and creativity, mentioning cases like Baltimore Orioles v MLB Players Association and Feist v Rural Telephone. But whether this U.S.-focused way of thinking is important is up for debate.

Beyond the PETA lawsuit, there isn't much legal reason to think about what the U.S. Copyright Office said. This office doesn't have the power of a court, and its guidebook for registration purposes doesn't carry legal weight. Moreover, the registration requirement in the U.S., important for enforcement, doesn't apply to the Indonesian-taken photo under §411 of the U.S. Code, as it isn't a "United States work."

Looking at the situation from the UK and European copyright law standpoint makes more sense

because the photo was first published in the UK. Contrary to what you might think, the monkey pressing the camera button doesn't matter much in deciding copyright in photographs. Copyright protection in photography depends on meeting the evolving originality requirement, different from the U.S. stance per Feist. The CJEU changed the definition in Infopaq v Danske Dagblades, saying a work must be the "author's intellectual creation," which applies to various works, as seen in BSA v Ministry of Culture.

In art, the element of selection, seen in "found objects" like Duchamp's Fountain, is seen as an important form of creativity and is protected by copyright. Courts, seen in Lucasfilm v Ainsworth, recognize the significance of purpose and selection in deciding originality.

In photography, the originality test in Art 6 of the Copyright Term Directive says photographs must be the "author's intellectual creation reflecting his personality." The CJEU's use of the originality test in Painer v Standard Verlags, involving a portrait, shows that a photographer's creative choices during the whole process deserve copyright protection.

UK courts, seen in Creation Records v News Group and Temple Island Collections v New English Teas, say that the photographer's input, including choices like the angle of the shot and field of view, is enough for copyright protection. Looking at the monkey selfie case from a UK and European perspective adds a nuanced view to the discussion of originality in photography.

IV. DOES MONKEY'S SELFIE HAVE A COPYRIGHT?

Considering everything discussed, it seems like there's a good argument that the monkey selfie could have a copyright, no matter who actually took the picture.

Looking at it legally, it's important to focus on what happened. According to Slater, he purposely set up the camera on a tripod to get the monkeys interested in it. This careful arrangement, following certain rules, suggests he was trying to take a picture that showed his personality. In legal terms, previous cases like Temple Island Collections and Painter stressed the importance of factors like angle, focus, and tripod use in showing the author's intent.

What comes after taking the pictures is also crucial. With hundreds of shots taken, Slater had to choose which ones to publish. This act of selection is recognized legally as important for proving originality, as seen in a case called Infopaq. So, the fact that Slater picked certain pictures, even if some were blurry, shows there was a thinking process behind the famous selfie.

Another point supporting the idea of copyright is a unique aspect of UK law. Although it doesn't mention animals, a law about computer-generated works suggests that if a person sets up the process leading to a work (like a photo taken by a digital camera), they're considered the author. This aligns with the idea that the person starting the process, in this case, Slater, is the author.

From a European legal view, the focus on granting copyright to creators making creative choices that reflect their personality diminishes the importance of simply pressing the button. This makes sense because copyright is more about what happens before and after taking the picture, rather than just the mechanical action of pressing the button. So, even if a machine helps, the person initiating the process is still seen as the author.

We're not going into Indonesian law much because it's not practical, and the parties involved aren't interested in dealing with it. However, it's interesting to note that Indonesian copyright law defines an author based on creativity, similar to European standards. So, one could argue that Slater might own the copyright there too.

V. CONCLUSION

In conclusion, it is expected that the analysis presented will clarify some misconceptions surrounding the monkey selfie case and stimulate discussions on the intricate jurisdictional matters and debates concerning originality and non-human authorship in future legal cases.

Considering the facts and relevant legal decisions in the UK and Europe, a compelling argument can be constructed supporting the existence of copyright in the monkey selfie image. David Slater can legitimately assert ownership of the copyright in the UK. His deliberate actions in following and gaining the trust of the monkey troupe allowed him to orchestrate the scenario conducive to placing a camera and enticing a monkey to take a picture. The subsequent process of selecting and developing

the image further indicates the potential presence of copyright in the picture.

Beyond the narrow scope of copyright law, the monkey selfie case holds broader significance for internet policy issues. It underscores the prevalence of an American-centric legal interpretation in online conflicts. Despite clear indications in many news articles that the picture was taken in Indonesia by a British individual, a significant portion of the legal analysis tends to overlook this and immediately applies U.S. jurisdiction. This pattern is observed in other instances where a legal analysis based on American standards is unwarranted. Discussions on European developments, such as recent data protection rulings by the CJEU, often adopt an American lens, neglecting the distinctive tradition of privacy protection in Europe.

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